SUPREME COURT U. S.

FILED
FEB 17 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM

No. 1051

CLIFTON FORREST, *Petitioner*

vs.

COMMONWEALTH OF VIRGINIA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

CALVIN W. BREIT
700 Rotunda Building
Norfolk, Virginia 23510

MELVIN J. RADIN
309 Rotunda Building
Norfolk, Virginia 23510
Counsel for Petitioner

PRINTED BY TEAGLE & LITTLE, INC., NORFOLK, VA.

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT	3
REASONS FOR GRANTING THE WRIT	6
CONCLUSION	12
APPENDIX A	1a
APPENDIX B	2a

Citations

Cases:

Bovey v. *Grandsinger*, 253 F.2d 917, 922 11

Fish v. *Commonwealth*, 208 Va. 761, 160 S.E. 2d 576 ..... 6, 7, 8

Powell v. *Alabama*, 287 U.S. 45, 53 S.Ct. 55 12

Washington v. *State of Texas*, 388 U.S. 14, 87 S.Ct. 1920, 1923 ..... 9, 10

Constitutional Provisions:

U.S. Const., Amend. VI 2

U.S. Const., Amend. XIV 3

Statutory Provisions:

§ 18.1-165, Code of Virginia, 1950, as amended 3

Authorities:

Canon 19 of the Canons of Professional Ethics, 205 Va. 1012, 1017 6

Opinion No. 47 of the Standing Committee on Legal Ethics of the Virginia State Bar 2a

Canon 5 of the Canons of Professional Ethics, 205 Va. 1013 12

IN THE

Supreme Court of the United States

OCTOBER TERM

No._____

CLIFTON FORREST, *Petitioner*

vs.

COMMONWEALTH OF VIRGINIA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

The Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Appeals of Virginia, entered in the above case on October 16, 1968.

OPINIONS BELOW

The opinion of the Hustings Court of the City of Portsmouth is not reported.

The opinion of the Supreme Court of Appeals of Virginia is not reported.

JURISDICTION

The judgment of the Supreme Court of Appeals was made and entered on October 16, 1968, and a copy is appended to this petition in the Appendix at p. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

The questions presented by this petition concern not merely the proceedings before the trial court, but the professional ethics of an attorney as well. These questions are:

1. Did the trial court, in effect, deny the petitioner the due process of law by requiring him to elect between presenting the testimony of a material witness in his behalf and having the assistance of counsel for his defense?

2. Did the trial court deny the petitioner the due process of law by refusing to grant him an opportunity to obtain counsel other than his original trial counsel, who was accused at the outset of the proceedings of participating in an attempt to obtain perjured testimony for the purpose of obtaining a dismissal of the indictment?

CONSTITUTIONAL PROVISIONS INVOLVED

That part of the Sixth Amendment to the Constitution of the United States of America, which provides:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

That part of Section 1 of the Fourteenth Amendment of the Constitution of the United States of America, which provides:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

STATEMENT

This petition involves the prosecution and resulting conviction upon an indictment charging the petitioner with violating the provisions of § 18.1-65 of the Code of Virginia, 1950, as amended. The offense was alleged to have been committed on September 17, 1967, and a jury trial commenced on October 10, 1967, and concluded the following day when the jury returned a verdict finding the petitioner guilty of assault and battery.

The alleged victim, H. Farrar, hereinafter referred to as Farrar, was the only material witness for the Commonwealth and according to his testimony, he met petitioner at the Police Headquarters in the City of Portsmouth and there discussed a $365.00 alleged indebtedness and was subsequently driven home by the defendant (Tr. p. 14). Around 7 P.M., the petitioner called at Farrar's home and drove him to the George Washington Tavern, a place of business owned by the petitioner in the City of Portsmouth, Virginia. The tavern was closed, as it was a Sunday. Farrar claims that he sat with Forrest and drank a beer while Forrest drank whiskey and they discussed the repayment of the loan the petitioner allegedly made to Farrar to purchase narcotics. Farrar claims that he offered to pay around the first of the month but this did not satisfy the petitioner (Tr.

pp. 17 and 18). The petitioner then went to the telephone, made a call and came back (Tr. p. 18). About ten minutes later Farrar saw two people outside the tavern and told the petitioner not to let them in because they had masks on. The petitioner opened the door, the two people rushed in, pushed the petitioner aside and then proceeded to beat up Farrar, hitting him in the face with a pistol and subsequently beating him with cue sticks from a pool table, which he indicated that the petitioner gave the two men. Subsequent to the beating, the petitioner drove the complaining witness, Farrar, home and pushed him out of the vehicle.

The petitioner denied having any connection with the beating and indicated that he had received a call from someone who claimed to have seen him with Farrar (Tr. p. 208). That Farrar owed the party on the phone a large sum of money, and that the unknown caller instructed Forrest under pain of injury to himself and his family, to have Farrar at his tavern to discuss the indebtedness; that subsequently two men came into his premises and struck both Farrar and the petitioner. The petitioner denied handing the cue sticks to the two men, having any connection with the two men or knowing who they were. After the incident, he offered to take Farrar to the hospital, but Farrar refused to go and requested that he be taken home. Subsequent to the day of the incident and prior to the trial, Farrar voluntarily came to the office of petitioner's attorney and there made a statement under oath before a Court Reporter denying most of what he had said in the lower Court and indicating that he knew who was in fact behind the beating and that the petitioner had no connection whatsoever with it. At the trial of this cause, on the 10th day of October, 1967,

the complainant, Farrar, took the stand to testify against the petitioner. In the course of doing so, the question of his statement under oath came out and then, for the first time, he indicated to the Court that he had made the statement under threat of fear of bodily harm and that the answers which he gave were in fact concocted by petitioner's lawyer who flashed to him, during the course of his testimony, written answers on a piece of paper, behind the view of the Court Reporter; that the petitioner's attorney nodded his head to indicate the nature of the answer that he desired. He further indicated that the petitioner's lawyer prompted him to make the statements, which were not true at the time he made them under oath.

Upon conclusion of direct testimony and before cross examination, defense counsel (Tr. p. 44 et seq.) moved the Court for leave to withdraw in order to take the stand as a witness and for a continuance to secure additional counsel for the petitioner. The Court overruled petitioner's request, to which action the petitioner excepted. Upon conclusion of the Commonwealth's evidence, the petitioner moved to strike. After hearing argument on the motion, the Court overruled the petitioner's motion, to which action the petitioner excepted. On the date of argument on motions to set aside the verdict, December 15, 1967, the witness, Farrar, without subpoena or previous indication, appeared in Court and advised the Judge of his desire to make a statement. Thereupon, after being first sworn, Farrar took the stand and repudiated his previous statements made at time of trial and, in effect, reiterated the statements made before the Court Reporter on the 27th day of September, 1967. Whereupon motions were made for a new trial on the

grounds of after discovered evidence, or, in the alternative, a judgment off acquittal notwithstanding verdict. After argument thereon the motions were all overruled, to which action the petitioner excepted. Thereupon on the 29th day of February, 1968, the Court entered judgment on the verdict and on October 16, 1968, the petition for appeal was denied by the Supreme Court of Appeals of Virginia.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted in this case because the trial court, by refusing to grant the petitioner an opportunity to replace Calvin W. Breit with other counsel, effectively denied the petitioner his right to present testimony of a witness which would have been relevant and material to his defense, and also effectively denied the petitioner his right to have the effective assistance of counsel for his defense.

1. It is basic that an attorney cannot take the stand to testify in behalf off the party he represents. Canon 19 of the Canons of Professional Ethics, 205 Va. 1012, 1017, provides:

> "When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody off an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in Court in behalf of his client."

The case of *Fish* v. *Commonwealth*, 208 Va. 761, presented a situation wherein it became necessary for an

attorney in a criminal proceeding to take the stand as a witness for his client. Prior to his taking the stand, the trial court had stated that the attorney would be permitted to return to argue the case. However, after the attorney testified, the trial court realized its error and required other counsel, not familiar with the case, to present the closing argument. The issue on appeal was whether the accused had been deprived of his right to counsel, and the answer was in the affirmative. Mr. Justice Carrico wrote in *Fish* v. *Commonwealth,* supra, 764:

> "Although Canon 19 frowns upon the practice of counsel becoming a witness in behalf of his client, it sometimes happens during the course of trial that the exigencies of the situation require such action—where, in the words of the canon, it is 'essential to the ends of justice.' We do not inquire into the question of whether such a situation existed in this case. Mr. Lindauer obviously thought it did exist, and the trial court manifestly agreed with him because the court ruled that it was 'proper' for Mr. Lindauer to testify in behalf of the defendant.
>
> "While the operation of Canon 19 may be the reason that no case authority has been found, the canon itself does supply, at least in part, the answer to the problem presented in this case. The canon requires that when it becomes necessary for counsel to take the witness stand in behalf of his client, he shall withdraw and 'leave the trial of the case to other counsel.'
>
> "Since there is the requirement upon counsel to request permission to withdraw and upon

withdrawal to 'leave the trial of the case to other counsel,' *there surely must be a reciprocal duty upon the court trying the case to permit such withdrawal, if it believes the request to be in good faith, and to afford the client reasonable opportunity to secure 'other counsel.'*"
(Emphasis added.)

It is apparent that the trial court agreed with petitioner's trial counsel that his testimony was essential to the petitioner's defense and, therefore, to the ends of justice, since the trial court ruled that it would be proper for Mr. Breit to testify on behalf of his client. However, Mr. Breit recognized the conditions that would have been imposed upon him after testifying for the petitioner, and he declined to take the stand unless the petitioner was granted an opportunity to obtain other counsel. This the trial court refused to permit. Had Mr. Breit accepted the offer of the trial court and attempted to return to the counsel table after testifying for his client, the situation would have been the same as that presented in *Fish* v. *Commonwealth,* supra, and it is interesting to note that the trial court in *Fish* v. *Commonwealth,* supra, was also the Hustings Court for the City of Portsmouth, Virginia, although a different judge was presiding.

The fact that Arthur C. Ermlich, a partner with Mr. Breit's law firm, was assisting him at the counsel table is immaterial. Mr. Ermlich was not prepared to accept the petitioner's defense. Furthermore, the admonitory language of Canon 19 was applicable to the attorney who testified as well as his partners, according to Opinion No. 47 of the Standing Committee on Legal

Ethics of the Virginia State Bar, which was announced on the date of October 26, 1953, the pertinent part of which provides: (The entire Subject, Inquiry, and Opinion of Opinion No. 47 is contained in Appendix B, p. 2a.)

> "Canon 19 provides that 'when a lawyer is a witness for his client, except as to merely formal matters such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel.' If a lawyer, after accepting employment, finds that he must be an essential or material witness, then it would be improper for him to continue as counsel in the case and he should withdraw. The relationship of partners in a law firm is so close that anything which requires a lawyer to refuse employment or withdraw from a case generally, but not always, requires his partners to do likewise . . . ."

The trial court, in effect, required the petitioner to elect between having Mr. Breit assist in his defense or testify on his behalf, and since the petitioner desired Mr. Breit's assistance as counsel, the necessary result of the trial court's ruling was that the petitioner was denied his right to put on the stand a witness who could give testimony that would have been relevant and material to his defense. This ruling of the trial court is in conflict with the decision of this Court in *Washington v. State of Texas,* 388 U.S. 14, 87 S. Ct. 1920, 1923, where Mr. Chief Justice Warren wrote:

> ". . . The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version

> of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law."

Mr. Chief Justice Warren concluded in *Washington* v. *State of Texas,* supra, 1925:

> "We hold that the petitioner in this case was denied his right to have compulsory process for obtaining witnesses in his favor because the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense. The Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use. . . ."

The holding in *Washington* v. *State of Texas,* supra, was inescapable in view of the provisions of the Sixth Amendment of the Constitution of the United States of America and the due process clause of the Fourteenth Amendment. For the same reasons, the conclusion in the instant situation must be that the petitioner was denied the due process of law when he was denied the right to obtain other counsel for the purpose of obtaining the testimony of Mr. Breit.

2. It is difficult to conceive of a manner in which the effectiveness of petitioner's counsel could have been more effectively eliminated than by preventing him from answering a charge that he participated in a felony, an attempt to suborn perjury, unless he should actually admit the truth of the charge, which was substantially the situation presented in *Bovey* v. *Grandsinger,* 253 F. 2d 917, 922, where it was stated:

> "It is difficult to imagine how the effectiveness of a defendant's counsel could be more completely destroyed than by causing him to confess before the jury, at the close of the evidence at the trial, that he had been guilty of gross misconduct in having tampered with the State's evidence . . . ."

Petitioner was forced to elect between being represented by counsel who could not take the stand and deny the accusation that he had participated in a felony and permitting his counsel to take the stand in rebuttal at the expense of continuing his defense without the assistance of counsel.

Consider also the fact that the "surprise testimony" of Farrar, which prejudiced the rights of the petitioner, was known and expected by the Commonwealth. However, the Commonwealth's attorney did not feel it necessary to disclose to the petitioner that Farrar would not only disavow his statement of September 27, 1967, but that he would also accuse the petitioner and his trial counsel of felonious conduct. Mr. Piersall stated:

> "I certainly am not aware of any law that says that the Commonwealth's Attorney is supposed to call up the attorney for the defense every time he finds some evidence in a case." (Tr. 48)

Evidently the Commonwealth's attorney had forgotten about Canon 5 of the Canons of Professional Ethics, 205 Va. 1013, which provides:

> "The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible."

Although Farrar disavowed, before the jury, his statement of the evening of September 27, 1967, his testimony on December 15, 1967, was consistent with that statement, while being in conflict with that presented before the trial court on October 10, 1967. Therefore, it seems that Mr. Breit should have been accused of obtaining the truth from Farrar. However, the trial court effectively prevented Mr. Breit from testifying in defense of Farrar's accusations and the refusal of the trial court to grant petitioner an opportunity to obtain other counsel constituted a denial of the petitioner's fundamental constitutional right to the effective assistance of counsel. *Powell* vs. *Alabama,* 87 U. S. 45., 53 S. Ct. 55.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

CALVIN W. BREIT
700 Rotunda Building
Norfolk, Virginia 23510

MELVIN J. RADIN
309 Rotunda Building
Norfolk, Virginia 23510

APPENDIX

APPENDIX A

IN THE SUPREME COURT OF APPEALS HELD AT THE SUPREME COURT OF APPEALS BUILDING IN THE CITY OF RICHMOND ON WEDNESDAY, THE 16th DAY of OCTOBER, 1968.

The petition of Clifton Forrest for a writ of error and supersedeas to a judgment rendered by the Court of Hustings for the City of Portsmouth on the 29th day of February, 1968, in a prosecution by the Commonwealth against the said petitioner for a felony, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said hustings court.

A Copy,

Teste:

/s/H. G. Turner
Clerk

APPENDIX B

OPINION No. 47
October 26, 1953

Subject:

Attorney appearing as witness in case in which he is serving as counsel.

Inquiry:

The law firm of A & B was retained by the father of an infant to represent the infant's claim for personal injuries arising out of an automobile that thereafter, during his negotiations with the defendant's insurance ad- accident and suit was instituted. Partner A handled all details and claims juster, a sum was offered in settlement.* The offer was oral and was to be submitted by Partner A to his client. Several days later, with client's approval, Partner A wrote the adjuster a letter accepting the offer. Subsequently, the adjuster and his company denied that the offer had been made and refused to make settlement. A & B now desire to abandon the court action and bring suit on the contract. Partner A would have to testify and would be essential and material witness. Partner B would not be a witness.

The firm desires to know to what extent either partner could participate as counsel and to what extent either or both partners could share in the fee either if the matter is handled by the partners or if it is referred to other counsel.

**injuries arising out of an automobile that thereafter, during his negotiations with the defendant's ~~insurance~~ ad- accident and suit was instituted. Partner A handled all details and claims juster, a sum was offered in settlement.*

This is as it appeared in the original.

Opinion:

Canon 19 provides that "when a lawyer is a witness for his client, except as to merely formal matters such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel." If a lawyer, after accepting employment, finds that he must be an essential or material witness, then it would be improper for him to continue as counsel in the case and he should withdraw. The relationship of partners in a law firm is so close that anything which requires a lawyer to refuse employment or withdraw from a case generally, but not always, requires his partners to do likewise. While the suit on the contract is an outgrowth of the original matter in which the firm was employed, yet it is a new case entirely different from the suit originally brought and the basis of the suit is the alleged offer by the insurance adjuster to Partner A and it appears that the suit must stand or fall upon the evidence of Partner A.

If suit is going to be instituted on the contract and Partner A is going to be a material witness, then your Committee is of the opinion that neither partner should act as counsel in the case, but the firm is entitled to compensation for work done up to the time of the development of the situation which required Partner A to be a witness.